TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

JANUARY TERM, 1900.

No. 961.

2

MINNIE C. KAISER, CARRIE V. KAISER, AND GEORGE J. KAISER, APPELLANTS,

vs.

CLARENCE A. BRANDENBURG AND MINNIE C. KAISER, EXECUTORS AND TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF FREDERICK J. KAISER, DECEASED; MARGIE M. EARNSHAW, AUGUSTA FLEMING, THE WESTERN PRESBYTERIAN CHURCH, AND CHARLES E. BUCK, JOHN MILLER, ABRAHAM D. VANDERVEER, TRUSTEES AND EXECUTIVE COMMITTEE OF THE ROCK CREEK CEMETERY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 15, 1900.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 25, 1900.

In the Court of Appeals of the District of Columbia.

MINNIE C. KAISER ET AL., Appellants,
vs.
CLARENCE A. BRANDENBURG ET AL. } No. 961.

a Supreme Court of the District of Columbia.

CLARENCE A. BRANDENBURG ET AL.
vs.
MINNIE C. KAISER ET AL. } No. 20478. Equity.

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill for Construction of Will of F. J. Kaiser, etc.*

Filed May 18, 1899.

In the Supreme Court of the District of Columbia.

CLARENCE A. BRANDENBURG and MINNIE C. Kaiser, Executors and Trustees under the Last Will and Testament of Frederick J. Kaiser, Deceased, Complainants, *vs.* MINNIE C. KAISER, CARRIE V. KAISER, George J. Kaiser, Margie M. Earnshaw, Augusta Fleming, The Western Presbyterian Church, and Charles E. Buck, John Miller, Abraham D. Vanderveer, Trustees and Executive Committee of the Rock Creek Cemetery, Defendants.	No. 20478, Equity Docket 46.

To the supreme court of the District of Columbia, holding an equity court:

The complainants respectfully state:

1. That they are citizens of the United States and residents of the District of Columbia and bring this suit as executors and trustees under the last will and testament of Frederick J. Kaiser.

2. That the defendants Minnie C. Kaiser, Margie M. Earnshaw, Augusta Fleming, Carrie V. Kaiser, George J. Kaiser are all citizens

of the United States and residents of the District of Columbia and are sued in their own right; that the defendant The Western
2 Presbyterian Church of Washington, D. C., is a religious corporation having its house of worship on H street northwest, between 19th and 20th streets, and is sued in its own right; that the remaining defendants are trustees and the executive committee having charge of the Rock Creek cemetery, in the District of Columbia, and are sued as such.

3. That Frederick J. Kaiser, late a citizen of the United States and resident of the District of Columbia, departed this life in said city and District on the 30th day of April, 1898, leaving a last will and testament dated the 5th of April, 1898, which was thereafter, to wit, on the 13th day of May, 1898, admitted to probate and record by the supreme court of the District of Columbia, holding an orphans' court, and recorded in Will Book No. —, at page —, and letters testamentary were granted to your petitioners, who thereafter qualified as such, and in virtue thereof have possessed themselves of the estate of the said Frederick J. Kaiser.

4. That in and by the said last will and testament, as by reference to a copy thereof, herewith filed, will more fully appear, said testator bequeathed to his sister, the defendant Minnie C. Kaiser, $2,000 in satisfaction of a debt of that amount which he owed her; $1,000 to the defendant Margie M. Earnshaw; $200 to the defendant Augusta Fleming; $300 to the defendant The Western Presbyterian Church of Washington, D. C., and $200 to The Trustees of Rock Creek Cemetery, in the District of Columbia, or to the officers in charge thereof, being the defendants herein named, for the purpose of im-
3 proving and caring for the burial lot of the family of said testator in said cemetery. In and by the sixth paragraph of said will said testator provided as follows:

"I direct my executors hereinafter named to sell and convert into cash the stock of goods and sell the entire contents of the store now conducted by me at premises No. 1114 F street, northwest, in the city of Washington, D. C., and I also direct them to sell and convey in fee-simple without liability on the part of any purchaser to see to the application of the purchase-money, all the real estate, wherever situated of which I may die seized or possessed, or to which I may be in any manner entitled at the time of my death and to divide the proceeds of sale of my said store and contents and of my said real estate, equally among my sisters Minnie C. Kaiser, Carrie V. Kaiser and my brother George J. Kaiser, share and share alike."

In and by the seventh paragraph of said will the said testator gave and bequeathed all the balance of his personal estate as well as all the rest and residue of his estate, of whatever kind and wherever situated, to his sister, Minnie C. Kaiser, absolutely.

5. That at the time of the death of the said Frederick J. Kaiser his personal estate consisted of a buggy and harness and a few personal effects appraised at $75, and a one-half undivided interest as partner in the china and crockery business conducted by the
4 firm of Wilmarth & Kaiser upon premises No. 1114 F street northwest, in the city of Washington, D. C., being the stock

of goods in the store referred to in the sixth paragraph of said will; that subsequent to the death of the said Frederick J. Kaiser, pursuant to the authority of the orphans' court of the supreme court of the District of Columbia, your complainants sold the interest of the said Frederick J. Kaiser in said business, and on account thereof received the sum of $1,308.80.

6. The complainants further aver that the said Frederick J. Kaiser in his lifetime was the owner of an undivided one-half interest in sublots B, C, and D, in square 127; north half of original lot 15, in square 127, and the south part of lot 15, in Davidson's subdivision of lots in square 127, as per plat recorded in the surveyor's office of the District of Columbia in Liber N. K., at pages 7 and 8, fronting 15 feet 2 inches on 18 street by the depth of said lot; lot 9, in square 341, and part of lot 9, in square 119, fronting 28 feet on Pennsylvania avenue northwest, and being such owner heretofore, to wit, on the — day of ——, he filed a bill in equity in the supreme court of the District of Columbia for a partition thereof; that pursuant to the proceedings had in said cause said lot 9, in square 341, was sold in the lifetime of the said Frederick J. Kaiser, and on account thereof he became entitled to the sum of $632.59, which amount was paid to your complainants, as executors and trustees under the will of said decedent, on the 31st day of March, 1899, subsequent to the death of the said Frederick J. Kaiser; that subsequent
5 to the death of the said Frederick J. Kaiser said part of lot 9, in square 119, was sold pursuant to proceedings had in said equity cause instituted by the said Frederick J. Kaiser in his lifetime, and on account thereof your complainants have received the sum of $1,680.19; that the remainder of said property in said proceedings described and above referred to was partitioned in kind between the parties to said suit by a decree passed subsequent to the death of the said Frederick J. Kaiser, and said sublot C, in square 127, was allotted to your complainants as trustees under the last will and testament of the said Frederick J. Kaiser, subject to the payment of Anson S. Taylor, as guardian of the said George J Kaiser, of the sum of $450.63, which was decreed to be a lien thereon and which remains unpaid.

7. That, in addition to the real estate aforesaid, said Frederick J. Kaiser at the time of his death was the owner in his own right of part of lot 4, in square No. 332, beginning for the same on the line of 11th street 31 feet north of the southwest corner of said lot 4, running thence north with the line of said street 15 feet 6 inches, thence east 99 feet and $\frac{87.5}{100}$ feet, thence south 15 feet 6 inches, west 99 feet and $\frac{87.5}{100}$ feet to the point of beginning, subject, nevertheless, to a deed of trust to secure the payment of a note amounting to $2,500 for borrowed money.

8. That since the death of the said Frederick J. Kaiser the defendant Minnie C. Kaiser has proven her claim against the estate of the said Frederick J. Kaiser for the sum of $2,000, for money bor-
6 rowed by the said Frederick J. Kaiser on the 4th day of August, 1897, being the amount referred to in paragraph one of said will; that the total amount of the debts of said de

cedent, exclusive of the expenses of administration, amount to, approximately, $3,000; that, as will be observed from the statements herein made, the complainants have received, as the proceeds of sale of real estate made in the lifetime of the said Frederick J. Kaiser, the sum of $632.59, and as the proceeds of the personal property specifically bequeathed in the sixth paragraph of said will the sum of $1,308.80, and that the aggregate of these items do not equal the amount of the indebtedness.

9. Your petitioners further aver that they are advised that by reason of the facts aforesaid and by reason of the provisions of the sixth paragraph of said will the defendants Minnie Kaiser, Carrie V. Kaiser, and George J. Kaiser are entitled to the rents collected by your complainants since the death of the said Frederick J. Kaiser and to the proceeds of sale (when made) of sublot C, in square 127, allotted to your complainant- as the share of the said Frederick J. Kaiser in the proceedings herein mentioned, nevertheless they are advised that the defendants Margie M. Earnshaw and Augusta Fleming claim they are entitled to the payment of the several legacies in their favor, in consequence of which fact it is necessary for your complainants to ask for the construction of said will by this honorable court, and for such directions as the necessities of the case may require.

7 10. Your complainants further aver that the defendants Carrie V. Kaiser and George J. Kaiser are infants, under the age of twenty-one years, and that some suitable person should be appointed guardian *ad litem* to protect their interests herein.

And being without other remedy, your complainants pray:

1. That a writ of subpœna may issue out of and under the direction of this honorable court directed to the persons named as defendants in the caption hereof, requiring them to appear and answer the exigencies of this suit.

2. That some suitable person may be appointed guardian *ad litem* for said Carrie V. Kaiser and George J. Kaiser, to answer for them and protect their interests herein.

3. That the provisions of the will of the said Frederick J. Kaiser may be construed by this honorable court, and the complainants directed as to the distribution of the fund in their hands.

4. That their account as executors and trustees may be settled before the auditor of this court.

And for such other and further relief as the nature of the circumstances of the case require and this honorable court shall seem proper.

CLARENCE A. BRANDENBURG,
Executor, &c.

CLARENCE A. BRANDENBURG,
Sol'r for Compl't-.

DISTRICT OF COLUMBIA:

8 Clarence A. Brandenburg and Minnie C. Kaiser upon oath say that they have read the foregoing bill by them subscribed and know the contents thereof; that the facts therein

stated upon their personal knowledge are true, and those stated upon information and belief they believe to be true.

CLARENCE A. BRANDENBURG.

—— ——.

Subscribed and sworn to before me this — day of ——, A. D. 1899.

—— ——,

Notary Public, D. C.

9 No. 8327, Adm'n Doc. 24.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

The United States of America to all persons to whom these presents shall come, Greeting:

Know ye that the last will and testament of Frederick J. Kaiser, of the District of Columbia, deceased, hath in due form of law been exhibited, proved, and recorded in the office of the register of wills for the District of Columbia, a copy of which is to these presents annexed, and administration of all the goods, chattels, and credits of the deceased is hereby granted and committed unto Clarence A. Brandenburg and Minnie C. Kaiser, the executors by the said will appointed.

Witness Alexander B. Hagner, justice holding the special term of the said supreme court for orphans' court business, this [SEAL.] 16th day of May, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-second.

Test: J. NOTA McGILL,

Register of Wills for the District of Columbia.

We, Clarence A. Brandenburg and Minnie C. Kaiser, do swear that we will well and truly administer the goods, chattels,
10 personal estate, and credits of Frederick J. Kaiser, late of the District of Columbia, deceased, to the best of our knowledge, according to law, and will give a just account of our administration when thereto we shall be lawfully called, so help us God.

CLARENCE A. BRANDENBURG.
MINNIE C. KAISER.

Sworn and subscribed to before me this 16th day of May, A. D. 1898.

Test: J. NOTA McGILL.

Register of Wills.

11 *Copy of Will.*

I, Frederick J. Kaiser, of the city of Washington, District of Columbia, do make, publish and declare this to be my last will and testament, hereby revoking all former wills by me at any time made.

1. I give and bequeath to my sister Minnie C. Kaiser the sum of two thousand dollars ($2,000.00) in satisfaction of a debt of that amount which I now owe her.

2. I give and bequeath to Margie M. Earnshaw the sum of one thousand dollars ($1,000.00).

3. I give and bequeath to Mrs. Augusta Fleming the sum of two hundred dollars ($200.00).

4. I give and bequeath to the Western Presbyterian Church of Washington, D. C., located on H street between Nineteenth and Twentieth streets, northwest, in said city, the sum of three hundred dollars ($300.00).

5. I give and bequeath to the trustees of the Rock Creek cemetery in the District of Columbia, or to the officers in charge thereof, the sum of two hundred dollars ($200.00) for the purpose of improving and caring for the burial lot of my family in said cemetery.

6. I direct my executors hereinafter named to sell and convert into cash the stock of goods and sell the entire contents of the store now conducted by me at premises No. 1114 F street, northwest, in the city of Washington, D. C., and I also direct them to sell and convey in fee-simple, without liability on the part of any
12 purchaser to see to the application of the purchase-money, all the real estate, wherever situated, of which I may die seized or possessed, or to which I may be in any manner entitled at the time of my death, and to divide the proceeds of the sale of my said store and contents, and of said real estate, equally among my sisters Minnie C. Kaiser, Carrie V. Kaiser and my brother George J. Kaiser, share and share alike.

7. I give and bequeath all the balance of my personal estate, as well as all the rest and residue of my estate, of whatever kind and wherever situated, to my sister Minnie C. Kaiser absolutely.

8. I nominate and appoint my sister Minnie C. Kaiser and my friend, Clarence A. Brandenburg, to be the executrix and executor of this my last will and testament, and trustees for the purpose of executing the trusts hereby created.

In testimony whereof, I have hereunto set my hand and seal at the city of Washington, D. C., this fifth day of April, A. D. 1898.

FREDERICK J. KAISER. [SEAL.]

Signed, sealed, published, and declared by the above-named testator, Frederick J. Kaiser, as and for his last will and testament, in the presence of us, who, at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses, at the city of Washington, D. C., this fifth day of April, A. D. 1898.

CHAS. E. ROACH, 512 F St. N. W.
JAMES C. COOK, " " "
JOHN J. HAMILTON, " " "

13 DISTRICT OF COLUMBIA, *To wit:*

On the 3rd day of May, 1898, came Clarence A. Brandenburg and made oath on the Holy Evangels of Almighty God that he does not know of any will or codicil of Frederick J. Kaiser, late of said District, deceased, other than the aforegoing instrument of writing dated April 5th, A. D. 1898, and that he received the same from the relatives, who found the same among the papers of said deceased after the death of said testator, and said Frederick J. Kaiser died on or about the 30th day of April, 1898.

CLARENCE A. BRANDENBURG.

Sworn to and subscribed before me—

[SEAL.] M. J. GRIFFITH,

Notary Public for the District of Columbia.

Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

MAY 5TH, 1898.

DISTRICT OF COLUMBIA, *To wit:*

This day appeared Charles E. Roach, James C. Cook, and John J. Hamilton, the subscribing witnesses to the foregoing last will and testament of Frederick J. Kaiser, late of the District of Columbia,
deceased, and severally made oath on the Holy Evangels of
14 Almighty God that they did see the testator therein named
sign this will; that he published, pronounced, and declared the same to be his last will and testament; that at the time of so doing he was, to the best of their apprehension, of sound and disposing mind and capable of executing a valid deed or contract, and that their names as witnesses to the aforesaid will were signed in the presence and at the request of testator and in the presence of one another.

Test: J. NOTA McGILL,

Register of Wills.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

DISTRICT OF COLUMBIA, *To wit:*

I, J. Nota McGill, register of wills for the District of Columbia and *ex officio* clerk of the said special term for orphans' court business, do hereby certify that the foregoing is a true copy of the original will of Frederick J. Kaiser, deceased, and the probate thereto, filed and recorded in the office of the register of wills for the District of Columbia aforesaid, and also that the said will, after
having been proven by the witnesses whose names appear in
15 the foregoing probate, was, by order of the supreme court of
the District of Columbia, holding a special term for orphans' court business, duly admitted to probate and record on the 13th day of May, A. D. one thousand eight hundred and ninety-eight.

In testimony whereof I hereunto subscribe my name and affix

the seal of the said supreme court, special term for orphans' court business, this 14th day of May, anno Domini 1898.

[SEAL.] J. NOTA McGILL.

16 *Separate Answer of Margie M. Earnshaw.*

Filed October 5, 1899.

In the Supreme Court of the District of Columbia.

C. A. BRANDENBURG ET AL. *vs.* MINNIE C. KAISER ET AL. } In Equity. No. 20478.

The separate answer of Margie M. Earnshaw, one of the defendants to the bill of complaint filed in the above-entitled cause, respectfully shows as follows:

This respondent admits all the statements contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, and 10 of the said bill.

For answer to paragraph 9 of the said bill, this respondent admits that she has claimed and still claims that she is entitled to the payment of the legacy in her favor to the amount of $1,000 made by the will of the late Frederick J. Kaiser, and mentioned in the said bill of complaint, and she denies that the defendants Minnie J. Kaiser, Carrie V. Kaiser, and George J. Kaiser are entitled to the proceeds of the sale of the real estate lately belonging to the said Frederick J. Kaiser or to the rents accruing since the death of the said Frederick J. Kaiser from his unsold real estate.

This respondent avers the fact to be that the said Frederick J. Kaiser, at the time of making his will, as set out in the said bill of complaint, which said time was less than four weeks before his death, had only the same property which he had at the time of his death, and that the said property was in precisely the same condition as to its nature, kind, and its mode of investment when the said will was made as when the said testator died; that the
17 said testator, at the time of making the said will, had no money, stocks, property, or other fund or source from or out of which the legacies could be paid except the property mentioned in the bill of complaint, and that the said testator well knew that the legacies by him in his will made could not be paid except from the proceeds of the sale of his property, the whole of which property is set out in the bill of complaint filed herein. In view of these facts, this respondent believes, and so believing avers, that the said testator intended and expected that the legacies to her and other persons made by the said testator's will, and mentioned and set out in paragraph 4 of the bill of complaint, should be paid from the proceeds of the sale of the testator's whole property, real and personal, afterwards in the said will directed to be made, and that the said legacies should be paid before the division of the remainder of the said testator's estate among Minnie C. Kaiser, Carrie V. Kaiser, and George J. Kaiser, which is afterward in the said will

directed to be made; and this respondent is advised and believes, and so avers, that, upon the true construction of the said will, she is entitled to be paid her said legacy out of the proceeds of the sale of the said testator's property immediately after the payment of the testator's debts from the said fund, and only so much of the said fund as is then left is available for distribution among the said Minnie C. Kaiser, Carrie V. Kaiser, and George J. Kaiser, and that the last-named legatees take the testator's estate subject to a charge therein in favor of creditors and the legatees previously named.

18 This respondent further avers that the value of the real estate of the said testator now remaining unsold, together with the proceeds of the sale of real and personal property made as is set out in the bill of complaint, is sufficient to discharge all the debts of the said testator and to pay the legacies to her and other persons mentioned in the 4th paragraph of the said bill.

FRANK T. BROWNING,
Solicitor for Margie M. Earnshaw.

Oath waived.

CLARENCE A. BRANDENBURG,
Solicitor for Complainant.

Memoranda.

May 18, 1899.—Order appointing *guardian ad litem* for Carrie V. Kaiser and George J. Kaiser.
" 18, " Answer of Carrie V. Kaiser and George J. Kaiser by guardian *ad litem* filed.
" 23, Answer of Western Presbyterian Church filed.
" 31, Answer of Rector and Vestry of Rock Creek Parish filed.

19 *Answer of Minnie C. Kaiser.*

Filed May 23, 1899.

In the Supreme Court of the District of Columbia.

CLARENCE A. BRANDENBURG ET AL., Complainants,
vs.
MINNIE C. KAISER ET AL., Defendants.
} No. 20478. Equity.

Separate answers of Minnie C. Kaiser to the bill of complaint against her and others in the above-entitled cause exhibited.

This defendant admits the truth of the allegations of the bill of complaint herein filed, and is advised, and therefore claims, that no part of the funds in the hands of the complainants or of the estate of Frederick J. Kaiser, deceased, vested in them, can be applied toward the payment of the several legacies set forth in the bill, or any of them.

And having fully answered, this defendant prays to be hence dismissed, etc.

MINNIE C. KAISER.

DISTRICT OF COLUMBIA, *ss:*

Minnie C. Kaiser upon oath says that she has read the foregoing answer by her subscribed and knows the contents thereof; that the facts therein stated upon personal knowledge are true, and those stated upon information and belief she believes to be true.

MINNIE C. KAISER.

Subscribed and sworn to before me this 18th day of May, 1899.

F. WALTER BRANDENBURG, JR.,
[SEAL.] *Notary Public.*

Memorandum.

October 5, 1899.—Replication filed to all answers.

21 *Depositions on Behalf of Complainant-.*

Filed October 19, 1899.

In the Supreme Court of the District of Columbia.

Whereupon MINNIE C. KAISER, a witness of lawful age, called by and on behalf of the complainants, being first duly sworn, is examined—

By Mr. BRANDENBURG:

Q. What is your age, please? A. Twenty-three years.

Q. What relation, if any, were you to Frederick J. Kaiser? A. Sister.

Q. What brothers and sisters have you living? A. William H. Kaiser, John George Kaiser, and Carrie V. Kaiser.

Q. So that at the time of your brother's death he left surviving him two sisters and two brothers; is that correct? A. Yes, sir.

Q. So that there are four children now living? A. Yes, sir.

Q. Which of these are of age? A. William H. Kaiser and myself.

Q. The other two are still under the age of twenty-one years? A. Yes, sir.

Q. Was Frederick J. Kaiser indebted to you in any way at the time of his death? A. Yes, sir; for two thousand dollars.

22 Q. What was that for? A. I lent it to him when he started in business for himself.

Q. What business was that? A. A china store on F street.

Q. What did he want that money for? A. To start a business with.

Q. How did you give it to him? Was it in cash or by check? A. In cash. I had bonds cashed at the Citizens' national bank.

Q. Where did you hand him the money? A. Right there at the bank.

Q. Were you to get this money back? A. Yes, sir.

Q. Where did you get these bonds? A. From my grandfather.

Q. What was your grandfather's name? A. Christopher Hagera.
Q. When did you get those bonds? A. When I was twenty-one.
Q. From whom did you get them? A. Mr. Taylor.
Q. What was his connection with your grandfather's estate? A. He was guardian for us.
Q. Did you get from Frederick J. Kaiser a note or anything else to show that? A. No.
23 Q. Has any part of that amount be- paid to you? A. No, sir; only six months' interest.
Q. Did he promise to pay you interest? A. Yes, sir.

Cross-examination.

By Mr. BROWNING:

Q. You knew that your brother had made a will, did you not? A. Not at the time.
Q. Not until after his death? A. Yes, sir.
Q. Do you know what estate your brother left? A. Yes, sir; you mean in property?
Q. Yes. What property did he leave? A. The house next door to where we live, No. 811 18th street, and then one on 11th street northwest.
Q. And the store? A. Yes, sir.
Q. He owned that property how long before his death? A. Well, it just had been divided a little before he died. I do not know exactly how long.

MINNIE C. KAISER.

Subscribed and sworn to before me this 18th day of October, A. D. 1899.

F. WALTER BRANDENBURG,
Examiner in Chancery.

24 CLARENCE A. BRANDENBURG, a witness of lawful age, called by and on behalf of the complainants, being first duly sworn, testified as follows:

I am a member of the bar and was attorney for Frederick J. Kaiser at the time of his death and for some time prior thereto and was very familiar with his affairs. I was also personally acquainted with him all his life, having lived in the same neighborhood and knew his parents and the condition of their affairs. For three or four months immediately preceding the death of Frederick J. Kaiser I saw him almost daily in regard to his affairs. At the time of his death he was engaged in the conduct of a crockery business, as an equal partner with James G. Wilmarth, under the firm name of Wilmarth and Kaiser, on F street, and he was trying to dispose of his interest in the business and withdraw. He died on April 30th, 1898. The first I knew of his leaving a will was that it was handed to me, in an envelope addressed to me by a cousin, Miss Bouvet, on the morning following his death, sealed up.

The will was filed by me in that form, and upon its being read I found that Minnie Kaiser and myself were appointed executors under it. This will, on my petition and the petition of Minnie C. Kaiser, was admitted to probate and record on May 13th, 1898, and I file herewith a certified copy of the will. We duly qualified as executors of his estate.

Minnie C. Kaiser, referred to in the will, is a sister of Frederick J. Kaiser. Margie M. Earnshaw, to whom the legacy of $1,000 is left, was not related in any manner to him. Augusta Fleming, named in the will, was his old housekeeper. The Western
25 Presbyterian church is a church on H street between 19th and 20th streets, and of which he was a member at the time of his death. The Rock Creek cemetery is a cemetery in which other members of his family were buried. At the time this will was made, on the 5th of April, 1898, which is its date, the personal estate of Frederick J. Kaiser consisted of a few personal effects, horse and buggy valued at $75 or $100, and $632.59, being the proceeds of sale of certain real estate which had been sold, but had not at that time been paid over to him, and undivided one-half interest in the firm of Wilmarth & Kaiser. We had an estimate made of the value of these goods shortly before this will was executed as a basis of a sale of his interest to Wilmarth, and the stock was estimated at cost price to be worth $8,000, and besides that they had a great many book accounts. He owned this interest at the time he made the will and at the time of his death. At the time of his death he was the owner of a one-fifth undivided interest in lots B, C, and D, in square 127, the north half of original lot 15, in square 127, and the south part of lot 15, in Davidson's subdivision of lots in square 127. Lot 9, in square 341, was sold in his lifetime, but had not been finally closed up when he was entitled as his share in that property to the sum of $632.59. The conveyance had actually been made in his lifetime. After his death, in partition proceedings in the supreme court of the District of Columbia, part of lot 9, in square 119, in which he had a one-fifth interest, was sold by myself and Mr. Ralston, as trustees, for the purpose of partition, and there was paid over to Minnie C. Kaiser and myself, as executors and trustees under the will, $1,680.19; that the other
26 property mentioned by him, and in which he owned a one-fifth undivided interest, was partitioned in kind, and there was decreed to Minnie C. Kaiser and myself, as trustees under the will of Frederick J. Kaiser, sublot C, in square 127, being house No. 811 18th street northwest, which is a very old house, with no modern improvements, and actually worth, perhaps, between four or five thousand dollars. For the purpose of equalization of partition, this property was charged with the payment to Anson S. Taylor, as guardian of George J. Kaiser, a brother, in the sum of $450.63, with interest, and that amount has not been paid. In addition to the property referred to, Frederick J. Kaiser, at the time of his death, owned in his own right part of lot 4, in square 332, about 17 feet front by 100 feet deep on 11th street northwest, improved by a two-story brick house worth, perhaps, twenty-eight or

twenty-nine hundred dollars, subject to a deed of trust to secure $2,500 for borrowed money.

I know that Frederick J. Kaiser borrowed from his sister, Minnie C. Kaiser, $2,000, with which to buy an interest in this business, and he used it in that manner, and that he had promised to pay her back out of the business, but never did pay her to the time of his death, but mentioned in his will that he was indebted to her in that amount. The total debts proved in the probate court against this estate amount to just about $3,000, while the trustees and executors have in their hands $632.59, as the proceeds of sale of real estate sold in the lifetime of Frederick J. Kaiser, but paid after his death, and the sum of $1,308.80, the net proceeds realized from the sale of his interest in the store. This small amount only was
27 realized on the sale by the executors and trustees, after the death of Frederick J. Kaiser, of his interest in the business, though we actually sold the interest in the business for a considerably larger sum; but Wilmarth, to whom the business was sold, became very ill shortly after and turned over the business to clerks, and it went to pieces, and finally creditors recovered a number of judgments against him and were about to sell out the stock, when, by agreement with us, the assets were finally sold, and we only received as a dividend on the amount due us for Kaiser's interest in the business the amount stated. Since the death of Frederick J. Kaiser we have received rents from 811 18th street and rents from the 11th Street house.

Cross-examination.

By Mr. BROWNING:

Q. You stated that Miss Earnshaw is not related in any way to Mr. Kaiser? A. Yes, sir.

Q. He was acquainted, however, with Miss Earnshaw? A. He was.

Q. He was waiting on her, was he not? A. He was visiting her, but with what idea I could not say. He never told me, but I knew that he was calling on the young lady.

Q. Mr. Kaiser had at the time of executing his will substantially the same property that he had at the time of his death, did he not? A. Yes; except, as stated, at the time of making the will it was really worth a good deal more.

28 Q. The actual property did not change, did it? A. No; but there was a loss after his death.

Q. In the way you have stated—from change of conditions? A. Yes, sir.

Q. But not of the changed condition of the property itself? A. No; except in the efforts to convert it into cash.

Q. So that when he died he did not have any more or less property that he had when he made the will? A. I think not.

Q. And that property, as you have said, consisted of his interest in this crockery business and the interest that he had in the real estate, with the exception of a small amount of personal property?

A. Yes, and the interest in the book accounts of the firm and in the proceeds of the sale of the real estate made in his lifetime.

Q. Who prepared his will? A. I do not know.

Q. Hasn't it ever been ascertained? A. I can state my belief merely. From the witnesses to the will I infer that it was prepared in the office of Hamilton and Colbert. On the envelope addressed to me he addressed me as his friend. He never informed me that he prepared a will. I never knew anything about it until after his death.

Q. In addition to the $600 and the $1,300 which came to your hands as personalty, you also have $1,600 as proceeds of real estate?

A. Yes, sir.

29 Q. So that this estate consists of $1,600 as a result of the sale of some real estate, $1,300 as a result of the sale of the crockery business, $600 from property that was sold before but turned over after his death, and then his interest in this real estate? A. Yes, sir.

Q. And the valuation you have made, of course, is your own idea? A. Except that I am very familiar with the property.

Q. What is the size of the lot? A. Do you mean the 18th Street house?

Q. Yes, sir. A. About 17 feet by nearly 100 feet, but the house is an old one, having been built before I was born.

Q. Between what streets is it? A. Between H and I streets.

Q. And the other lot is on 11th street? A. Yes, sir. I will say that the 18th Street house only rents for $20 a month.

CLARENCE A. BRANDENBURG.

Subscribed and sworn to before me this 17th day of October, A. D. 1899.

F. WALTER BRANDENBURG,
Examiner in Chancery.

30 *Deposition for the Defendant.*

Filed November 3rd, 1899.

In the Supreme Court of the District of Columbia.

OCTOBER 27TH, 1899.

Met pursuant to notice.
Present: Mr. Clarence A. Brandenburg and Frank T. Browning.

Whereupon MICHAEL J. COLBERT, witness of lawful age, being first duly sworn, deposed and said as follows:

Q. Give your name and occupation. A. Michael J. Colbert; lawyer.

Q. Were you acquainted with Frederick J. Kaiser, the testator of the will in question? A. Yes, sir.

Q. Do you know who prepared the will in question in this suit? A. I did.

Q. At the time he gave you the data for preparing the will, did he say to you who Margie Earnshaw was? A. Yes; he did.

Q. What did he say in reference to her?

(Objection.—Counsel for the complainants objects to the question and to any answer of the witness, on the ground that it is immaterial; that the will is unambiguous and speaks for itself.)

31 A. He gave me to understand that she was a lady he was to marry. My notes here have it that she was his sweetheart. I cannot say that that was the word he used, but that was the idea.

Q. Did he tell you all the property he possessed? A. I asked him that question, and his answer, according to the memorandum which I made at the time was, "I own, first, stock in the F Street store; second, real estate inherited from my father and grandfather —a one-fifth interest." I might qualify that answer by saying that I asked him what property he owned.

—. The question was, Did you ask what all his property was? —. I asked him what property he owned.

(Counsel for the complainants asked that his objection heretofore made may apply to all of this line of testimony without repeating it.)

Q. Did he seem, from your interview with him, to know what he was doing, and to be fully acquainted with his business affairs?

(COUNSEL FOR THE COMPLAINANTS: I object to the question because there is no issue in this proceeding upon the will as to the competency of the testator, and the will itself is clear and unambiguous.)

A. I didn't see anything the matter with him; I thought he was perfectly competent to make a will. He answered every question that I asked him intelligently. I didn't inquire into his business affairs except as I have indicated.

Cross-examination:

32 Q. Did you make a memorandum at the time of your conversation with Mr. Kaiser? A. I made very full notes.

Q. Do those notes substantially represent all that transpired between you? A. Everything, in substance.

Q. Have you those notes with you? A. I have them in my hand now.

Q. Are they all in longhand or not? A. With the exception of one word on the first page, they are all in longhand. After Mr. Kaiser left my office I wrote a brief statement of what took place between us in shorthand, and after that made a copy of the will in shorthand, as I usually do.

Q. Will you please state what is the word on the first page in shorthand to which you refer? A. Sweetheart.

Q. That word is found in connection with the memorandum relating to the legacy to Miss Earnshaw, is it not? A. Yes, sir.

Q. Did he state that she was his sweetheart, or is that an expres-

sion merely of the impression left on your mind as a result of his remark? A. He told me, either voluntarily or in response to a question which I asked, that she was the lady he was going to marry or that she was the lady he was engaged to be married to, or some similar expression. I cannot now undertake to say that he used that expression.

Q. As I understand it, you didn't inquire into the details of his business or his financial condition? A. I only asked him what property he owned. I recollect, independently of what is on
33 this paper, that he told me that he had some business connection with the firm of Wilmarth and Kaiser.

Q. Did you ask him or did he tell you what personal property he owned? A. He only told me that he owned the stock in his store on F street. I made no further inquiry.

Q. Did you ask him or did he tell you what money he had or what money was due to him? A. I have no recollection of anything of that kind.

Q. Did you ask him or did he tell you the value of his interest in the business of Wilmarth and Kaiser? A. My recollection is that he did not tell me.

Q. Did you ask him or did he tell you the amount of accounts receivable due the firm in which he had a one-half interest? A. My recollection is that he didn't say anything about that, and that I didn't ask him anything about it.

Q. And is that to apply as to personal effects—horse and buggy and similar personal property? A. That is true with this exception: that when I got down to the residuary clause I asked him what he wanted to do with whatever might be left, and he told me what I have written in these notes. I made no particular inquiry as to the extent or the value of his personal property.

Q. Did he give you to understand at the time that his estate was sufficient to pay all *all* legacies in full and leave a surplus? A. I don't remember anything of that kind; I assumed it was so.

Q. Will you please translate the shorthand notes made by you immediately after Mr. Kaiser left, as giving your recollection
34 at the time of what had transpired between you? A. April 5th, 1898. Mr. Kaiser called on me on April 4th and made an appointment with me for the morning of April 5th, 1898, for the purpose of making his will. He called on the morning of April — and gave me his instructions, exactly as I have written them above, and I accordingly prepared his will as he directed. Mr. Kaiser informed me that the relations between him and his brother, William H. Kaiser, were not pleasant, and he wanted him excluded absolutely from any participation in his estate, and stated that he wanted to leave him ten (10) dollars or some nominal sum in order that he might not be able to break the will. I told him that such a thing was not necessary, and that it was best not to make any mention of his name at all, and he agreed to this. I then prepared his will, and it was executed at my office. I then signed my initials to this memorandum.

Q. On what date did you make that memorandum? A. On April 5th, immediately after the execution of the will.

Q. Will you kindly file those notes, with the understanding that if your desire them they will be returned to you? A. Yes, sir.

MICHAEL J. COLBERT.

Subscribed and sworn to before me this 3rd day of November, A. D. 1899.

ARTHUR BROWNING, *Examiner.*

35 *Decree Construing Will.*

Filed December 22, 1899.

In the Supreme Court of the District of Columbia.

CLARENCE A. BRANDENBURG ET AL., Complainants, *vs.* MINNIE C. KAISER ET AL., Defendants. } No. 20478. Equity.

This cause coming on to be heard on the pleadings and evidence, and being argued by counsel and considered by the court, and it appearing to the court that the total amount of the personal estate coming into the hands of the complainants as executors and trustees under the last will and testament of Frederick J. Kaiser, deceased, and the proceeds of sale of real estate made subsequent to the death of said Frederick J. Kaiser and mentioned in the testimony herein, will be absorbed in the payment of the debts due and provable against the estate of the said Frederick J. Kaiser; but it further appearing to the court that the real estate vested in said complainants as executors and trustees under the last will and testament of said Frederick J. Kaiser and remaining unsold is more than sufficient to satisfy and pay in full the general legacies bequeathed in paragraphs 2, 3, 4, and 5 of the will of said deceased, and the court being of opinion that paragraph 6 of said will does not operate to give Minnie C. Kaiser, Carrie V. Kaiser, and George J. Kaiser the entire proceeds of sale of said real estate when sold, but merely the net proceeds after the payment of expenses of administration attending the sale thereof and after the pay-

36 ment of the general legacies set forth in paragraphs 2, 3, 4, and 5 of said will, it is thereupon by the court this 22d day of December, 1899, adjudged, ordered, and decreed that the complainants, as executors and trustees under the last will and testament of Frederick J. Kaiser, settle their accounts under the orders and decrees of this court, and that upon any sale being made by the complainants, as trustees, as aforesaid, of the real estate vested in them under the last will and testament of said Frederick J. Kaiser, they shall out of the proceeds of such sale first pay the expenses thereof and other costs and expenses properly chargeable against the same; secondly, they shall pay the defendant Margie M. Earn-

shaw the sum of one thousand dollars ($1,000), the defendant Augusta Fleming the sum of two hundred dollars ($200), the defendant The Western Presbyterian Church of Washington, District of Columbia, the sum of three hundred dollars ($300), and The Trustees of Rock Creek Cemetery, in the District of Columbia, the sum of two hundred dollars ($200), if the proceeds of sale of said real estate shall be sufficient to pay the same in full, and if not, then in proportion to the respective amounts thereof; and thirdly, the surplus remaining, if any, to the defendants Minnie C. Kaiser, Carrie V. Kaiser, and George J. Kaiser in equal shares.

And from the foregoing decree the said defendants, Minnie C. Kaiser, Carrie V. Kaiser, and George J. Kaiser, in open court pray an appeal to the Court of Appeals of the District of Columbia and for a severance for the purpose of such appeal against the remaining defendants to this cause; which severance is hereby granted
37 and which appeal is hereby allowed, and the penalty of the bond on appeal be, and the same is hereby, fixed at the sum of one hundred dollars ($100).

JOB BARNARD, *Justice.*

Memorandum.

December 22, 1899.—Appeal bond filed.

Opinion of Barnard, Justice.

Filed December 21, 1899.

In the Supreme Court of the District of Columbia.

CLARENCE A. BRANDENBURG ET AL.
vs.
MINNIE C. KAISER ET AL. } No. 20478. Equity.

The bill in this case is filed to have a judicial construction of the will of Frederick J. Kaiser and a decree directing the complainants, who are his executors and trustees, as to the proper distribution of the funds in their hands, and that they be allowed to settle their account in this court.

38 The legatees and devisees and heirs-at-law of said testator are made defendants, and the principal issue is raised on the answer of Margie M. Earnshaw, to whom a legacy of $1,000 is left by the second paragraph of the will.

The will was executed April 5, 1898, and the testator died on April 30, 1898.

The will is in the following words:

"I Frederick J. Kaiser, of the city of Washington, District of Columbia, do make, publish and declare this to be my last will and testament, hereby revoking all former wills by me at any time made.

1. I give and bequeath to my sister Minnie C. Kaiser the sum of two thousand dollars ($2,000.00) in satisfaction of a debt of that amount which I now owe her.

2. I give and bequeath to Margie M. Earnshaw the sum of one thousand dollars ($1,000.00).

3. I give and bequeath to Mrs. Augusta Fleming the sum of two hundred dollars ($200.00).

4. I give and bequeath to the Western Presbyterian Church of Washington, D. C., located on H street between Nineteenth and Twentieth streets, northwest, in said city, the sum of three hundred dollars ($300.00).

5. I give and bequeath to the trustees of the Rock Creek cemetery in the District of Columbia, or to the officers in charge thereof, the sum of two hundred dollars ($200.00) for the purpose of improving and caring for the burial lot of my family in said cemetery.

6. I direct my executors hereinafter named to sell and convert into cash the stock of goods and sell the entire contents of the store now conducted by me at premises No. 1114 F street,
39 northwest, in the city of Washington, D. C., and I also direct them to sell and convey in fee simple, without liability on the part of any purchaser to see to the application of the purchase-money, all the real estate wherever situated, of which I may die seized or possessed, or to which I may be in any manner entitled at the time of my death, and to divide the proceeds of the sale of my said store and contents, and of my said real estate, equally among my sisters Minnie C. Kaiser, Carrie V. Kaiser and my brother George J. Kaiser, share and share alike.

7. I give and bequeath all the balance of my personal estate, as well as all the rest and residue of my estate, of whatever kind and wherever situated, to my sister Minnie C. Kaiser absolutely.

8. I nominate and appoint my sister Minnie C. Kaiser and my friend, Clarence A. Brandenburg, to be the executrix and executor of this my last will and testament, and trustees for the purpose of executing the trusts hereby created.

In testimony whereof I have hereunto set my hand and seal at the city of Washington, D. C., this fifth day of April, A. D. 1898.

FREDERICK J. KAISER. [SEAL.]"

Testimony was taken to show what estate the testator had at the time of his death, and when the will was made, and also to show his relations and circumstances.

From this it appears that his personal property consisted of his one-half interest in the crockery store of Wilmarth & Kaiser, 1114 F St., a horse and buggy valued at $75 or $100, and $632.59 due from sale of some real estate. Besides this he had an interest in the book accounts of said store, but there is no evidence
40 showing what they were, or that anything has been realized from them. He also had several pieces of real estate.

His debts amounted to about $3,000, which includes the $2,000 due his sister, and for which he gave her the legacy named in the first paragraph of the will.

It is also shown by the testimony that he was unmarried; that he had two sisters and one brother, who are mentioned in his will,

and one brother not mentioned, and that Margie M. Earnshaw was a young lady to whom he was engaged to be married.

The instructions given to his attorney when the will was prepared are also put in evidence, and, according to the notes made thereof, the instructions for the legacies and devises mentioned in the 6th and 7th paragraphs were as follows:

"All the *rest and residue* of real estate and stock in store 1114 F St. N. W., and personal estate is to be sold & *proceeds* divided between Minnie C., Carrie V., and George J. Kaiser; and all my personal estate to go to Minnie C. Kaiser."

It is conceded that if the legacies named in the first five paragraphs of the will are valid or can be paid, it will require the application of a part of the proceeds of the real estate, but that there is sufficient real and personal estate, taken together, to pay all the debts and money legacies.

It is claimed, however, that the legacies and devises contained in the 6th paragraph are *specific*, and that the property therein bequeathed and devised cannot be used to pay the general legacies, and inasmuch as all the personal estate will be exhausted in the payment of debts (the net proceeds of the store amounting to
41 only $1,308.80), the legacy to Miss Earnshaw and the other legacies, except the first one named, cannot be paid at all.

On the other hand, it is contended that the testator knew he had no personal estate outside of the store sufficient to pay his debts alone, to say nothing of the money legacies named, and that, taking the whole will together, explained by the testimony as to his property and surroundings at the time the will was drawn, his intention is clearly shown in a manner warranted by the authorities, namely, that all he wished to dispose of by the 6th paragraph was what was left after payment of his debts, expenses of sales, costs of administration, and the money legacies mentioned in the preceding paragraphs, and that such he understood to be meant by the use of the word "proceeds."

It is also claimed that the direction to sell the property and divide the proceeds among the parties named takes this out of the category of "specific" legacies.

As to this last contention, my opinion is that such a legacy would still partake so much of the character of a specific legacy that it would not be liable to abate with general legacies upon a deficiency of assets.

A specific legacy properly means one where the particular article or chattel is given to a certain person. In the very nature of the case, all devises of real estate to certain persons are specific—the thing itself—the land is thereby given by the devise.

So far as the 6th paragraph speaks of real estate, it embraces *all* the testator owned, and directs it to be sold. So far as it speaks of personal estate, it only refers to the store, leaving other personal property, or at least the possibility of such, undisposed of, and
42 hence the 7th paragraph was added. If the 6th paragraph had been omitted, and the 7th had thereby followed the first five, there could be no doubt as to the testator's meaning, as decided by

the Supreme Court of the United States in Lewis *vs.* Darling, 16 How., 1. Such a will blends the personal and real estate together in one fund, and the residue means what is left of the whole fund so created after payment of debts and money legacies.

While testimony is admissible to show the circumstances of the testator—his estate, his likes and dislikes, his relations, and even his declarations and the instructions or directions to his lawyer by which he is to write the will—still it is contended that the courts hold that this testimony cannot be made the foundation for changing the will and making a new and different one, if there is no ambiguity in it; that such proof is only allowable to explain who is to take, where there is uncertainty as to the legatee, or what is to be given, where there is a defective description of the subject of the gift. All parts of a will must be given effect, if possible, in construing it; and if the testimony in this case is properly admissable and the court can see the situation of the testator's mind, it is apparent that no effect could be given to the first five paragraphs as creating general money legacies, because the testator must have known there was no property applicable thereto, if the contention of his executor can be maintained. Can it, therefore, be presumed that he named these legatees in his will among the first objects of his bounty only as a mockery to them, a disappointment, a mere idle string of words to raise a hope never to be and never intended to be realized?

43 He was too near the gates of the unknown world to make a joke in this solemn instrument at the expense of his dearest friends. The instructions to his attorney demonstrate beyond doubt that he intended all these legacies to be paid from his property generally or certainly from his real estate, and that he only desired to divide the proceeds of what was left among his sisters and brother.

Notwithstanding the moral certainty of the testator's intent to be as just stated, still the complainants claim that such intent cannot be made operative or effective, because to do so would require words to be added to the will, which is already plain and complete on its face, and that such addition is not allowable under the well-established rules of interpretation.

I am disposed to consider the 3d rule of interpretation, as laid down by Chancellor Wigram, as applicable to this will:

"Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are *insensible with* reference to *extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the *meaning* of the *words be sensible* in any *popular or secondary* sense of which, with reference to these circumstances, they are capable." In a popular, or, perhaps more properly, a loose or inaccurate sense, we sometimes use the word "proceeds," as applied to any sale or business venture or discount of a negotiable instrument, as to mean the net result derived there-

and one brother not mentioned, and that Margie M. Earnshaw was a young lady to whom he was engaged to be married.

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41 only $1,308.80), the legacy to Miss Earnshaw and the other legacies, except the first one named, cannot be paid at all.

On the other hand, it is contended that the testator knew he had no personal estate outside of the store sufficient to pay his debts alone, to say nothing of the money legacies named, and that, taking the whole will together, explained by the testimony as to his property and surroundings at the time the will was drawn, his intention is clearly shown in a manner warranted by the authorities, namely, that all he wished to dispose of by the 6th paragraph was what was left after payment of his debts, expenses of sales, costs of administration, and the money legacies mentioned in the preceding paragraphs, and that such he understood to be meant by the use of the word "proceeds."

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"Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are *insensible with* reference to *extrinsic circumstances*, a court of law may look into the extrinsic circumstances of the case to see whether the *meaning* of the *words be sensible* in any *popular or secondary* sense of which, with reference to these circumstances, they are capable." In a popular, or, perhaps more properly, a loose or inaccurate sense, we sometimes use the word "proceeds," as applied to any sale or business venture or discount of a negotiable instrument, as to mean the net result derived there-

from after payment of encumbrances, expenses of sale,
44 taxes, brokerage, &c., and we might well conceive that a testator situated as Mr. Kaiser was might have understood by this word the net result from sale of his real estate and store after all such expenses were paid, and also all debts and the money legacies named. It would need no judicial construction to include the word "debts" among "costs of sale," &c., to be taken out before the "proceeds" could be ascertained which could be divided, because it would be understood that they must be deducted as being a lien on the lands. The testator had only to extend the idea one step further to include the money legacies, because he had directed them to be paid, and he may have regarded such direction as equivalent to making them liens, equally with his debts, or expenses of administration and sale. Giving such meaning to the word, or reading as if the words "balances of" were understood as being immediately before the word "proceeds," all doubt and ambiguity disappear from the will, and it then harmonizes exactly with the facts proven as to the extrinsic circumstances. I think the court may so read the will, in the light of these circumstances, without violating the rules of construction on this principle alone. In Finlay *v.* King's Lessee, 3 Pet., 376, Chief Justice Marshall says: "The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected or so restrained in their *application* as materially to change the *literal meaning* of the particular sentence." Chief Justice Sharswood, speaking
45 of the word "proceeds" in Thompson's Appeal, 89 Pa. Stat., 45, says it is conceded to be a word of equivocal import—that it may mean the "corpus," or only the "income" from an estate mentioned. If used by a testator in relation to all of his real estate after making certain money legacies which he knows there is no way of paying except from sale of some of this real estate, is it stretching the point any further than was done by Chief Justice Sharswood if the court shall decree that what he meant by the word "proceeds" was the money remaining from the sale of all his real estate after payment therefrom of the legacies stated and the other charges thereon?

If, however, there is any doubt that this principle is sufficient to warrant the court in making such construction, there is yet another rule that also seems applicable. That is the principle which was sustained by the Supreme Court of the United States in the case of Patch *v.* White, 117 U. S., 210.

It is the VII rule as laid down by Chancellor Wigram, and is as follows:

"Notwithstanding the rule of law which makes a will void for uncertainty where the words aided by evidence of the material facts of the case are insufficient to determine the testator's meaning, courts of law, in certain special cases, *admit extrinsic evidence of intention* to make certain the person or *thing* intended, where the description in the will is insufficient for the purpose. These cases

may be thus defined: Where the object of the testator's bounty or the subject of disposition (*i. e., person* or *thing intended*) is described in terms which are applicable indifferently to more than one *person*
or *thing*, evidence is admissable to prove which of the *persons*
46 or *things* so described was intended by the testator."

In the present case the extrinsic evidence of intention is properly admissable, in my opinion, to explain what was the subject or thing to be divided among the sisters and brother under the terms of the 6th paragraph.

In Atkinson's Lessee *v.* Cummins, 9 Howard, 486, Mr. Justice Grier states with approval the rule as laid down in Miller *v.* Travers, 8 Bingham, 244, as follows: "In all cases where a difficulty arises in applying the words of a will or deed to the subject-matter of the devise or grant, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted or removed by the production of further evidence upon the same subject calculated to explain what was the *estate* or subject-matter really intended to be granted or devised."

See 8 Bingham (21 Eng. Com. L. R.), 526.

See also Doe, demise Gord, *v.* Needs.

2 M. & W., 128, and *note* at *foot* of *case*.

In Selwood *v.* Mildway, 3 Vesey, Jr., 306, evidence of the instructions given by testator to his attorney from which to prepare the will was allowed, and by which evidence the intent of the testator was ascertained.

I read what Justice Bradley said in Patch *v.* White as follows (p. 216–218):

"It is undoubtedly the general rule that the maxim just quoted is confined in its application to cases where there is sufficient in the will to identify the subject intended to be devised, independently of the false description, so that the devise would be effectual without it; but why should it not apply in every case where the extrinsic
facts disclosed make it a matter of demonstrating certainty
47 that an error has crept into the description, and what that
error is? Of course, the contents of the will, read in the light of the surrounding circumstances, must lead up to and demand such correction to be made.

It is settled doctrine that as a latent ambiguity is only disclosed by extrinsic evidence, it may be removed by extrinsic evidence. Such an ambiguity may arise upon a will either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description, or, secondly, it may arise when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence, or, if in existence, the person is not the one intended or the thing does not belong to the testator. The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence that will have that effect, either circumstances or declarations of the testator. 1 Jarman on Wills, 370; Hawkins on Wills, 9, 10. Where it consists

of a misdescription, as before stated, if the misdescription can be struck out and enough remain in the will to identify the person or thing, the court will deal with it in that way, or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate and the circumstances by which he was surrounded at the time of making his will. 1 Jarman
48 on Wills, 364, 365; 1 Roper on Legacies, 297, 4th ed.; 2 Williams on Executors, 988, 1032. Mr. Williams (afterwards Mr. Justice Williams) says: 'Where the name or description of a legatee is erroneous and there is no reasonable doubt as to the person who was intended to be named or described, the mistake shall not disappoint the bequest. The error may be rectified: * * * 1. By the context of the will. 2. To a certain extent by parole evidence. * * * A court may inquire into every material fact relating to the person who claims to be interested under the will and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person intended by the testator'—pp. 988, 989. Again he says, on page 1032: 'Mistakes in the description of legacies, like those in the description of legatees, may be rectified by reference to the terms of the gift and evidence of extrinsic circumstances taken together. The error of the testator, says Swinbourne, in the proper name of the thing bequeathed doth not hurt the validity of the legacy, so that the body or substance of the thing bequeathed is certain. As, for instance, the testator bequeaths his horse Griple, when the name of the horse was Tulip. This mistake shall not make the legacy void, for the legatory ma*de* have the horse by the last denomination, for the testator's meaning was certain that he should have the horse. If, therefore, he hath the thing devised, it is not material if he hath it by the right or wrong name.' See also Roper on Legacies, 297.

The rule is very distinctly laid down by Sir James Wigram, who says: 'A description, though false in part, may, with refer-
49 ence to extrinsic circumstances, be absolutely certain or at least sufficiently so to enable a court to identify the subject intended, as where a false description is superadded to one which by itself would have been correct. Thus, if a testator devise his black horse, having only a white one, or devised his freehold houses, having only leasehold houses, the white horse in the one case and the leasehold houses in the other would clearly pass. In these cases the substance of the subject intended is certain, and if there is but one such substance the superadded description, though false, introduces no ambiguity, and as by the supposition the rejected words are inapplicable to any subject, the court does not alter, vary, or add to the effect of the will by rejecting them.' Wigram on Extrinsic Evidence, 53. Of course when the author speaks of the rejected words as being 'inapplicable to any subject' he means inapplicable because the subject is not in existence or does not belong to the testator."

From the whole case, as made by the will and the testimony as to the extrinsic facts, my conclusion is that the testator intended the money legacies named in the first five paragraphs of the will to be first paid from the proceeds of his property before a division thereof was made among his sisters and brother named in the sixth paragraph.

The decree should express this construction and direct payment of the legacies whenever sufficient property has been sold to realize the necessary fund and the account of complainant is stated.

JOB BARNARD, *Justice.*

50 *Stipulation of Counsel as to Preparation of Record on Appeal.*

Filed December 23, 1899.

In the Supreme Court of the District of Columbia.

CLARENCE A. BRANDENBURG ET AL., Executors, *vs.* MINNIE C. KAISER ET AL. } No. 20478. Equity.

It is stipulated between the undersigned, solicitors for the respective parties to the above cause, that the record on appeal in said cause shall consist of the following:

Bill filed May 18, 1899.

Copy of will.

Copy in full, answer of Margie Earnshaw.

Without copying the same in full, making the following recitals at this point:

May 18, 1899.—Order appointing guardian *ad litem* for Carrie V. Kaiser and George J. Kaiser.

May 18, 1899.—Answer of Carrie V. Kaiser and George J. Kaiser by guardian *ad litem* filed.

May 23, 1899.—Answer of Western Presbyterian Church filed.

May 31, 1899.—Answer of Rector and Vestry of Rock Creek Parish filed.

Copy the answer of Minnie C. Kaiser, filed May 23, 1899.

Recite that on October 5, 1899, replication was filed to all answers.

51 Insert the depositions filed on behalf of the complainants, omitting caption and certificate.

Insert deposition filed on behalf of the defendant, omitting caption and certificate.

Insert decree of court of December 22, 1899.

Note that appeal bond was filed and approved on December 22, 1899.

Insert the opinion of court, filed December 21, 1899.

CLARENCE A. BRANDENBURG,
Solicitor for Minnie C. Kaiser et al.
FRANK T. BROWNING,
CHARLES A. KEIGWIN,
Solicitors for Margie M. Earnshaw.

52 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 51, inclusive, to be a true and correct transcript of the record (as per stipulation of counsel herein filed and made a part hereof) in cause No. 20478, equity, wherein Clarence A. Brandenburg *et al.* are complainants and Minnie C. Kaiser *et al.* are defendants, as the same remain upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13th day of January, A. D. 1900.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 961. Minnie C. Kaiser *et al.*, appellants, *vs.* Clarence A. Brandenburg *et al.* Court of Appeals, District of Columbia. Filed Jan. 15, 1900. Robert Willett, clerk.